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In the Supreme Court of the United States

OCTOBER TERM, 1958

NO. 314

REYNOLDS METALS COMPANY, *Petitioner,*

v.

PAULA MARTIN YTURBIDE, *Respondent.*

REYNOLDS METALS COMPANY, *Petitioner,*

v.

VERLA MARTIN, *Respondent.*

REYNOLDS METALS COMPANY, *Petitioner,*

v.

PAUL MARTIN, *Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Respondents submit the following statement, as permitted by Rule 24 of this Court, in opposition to the granting of the Petition for Writ of Certiorari.

These cases have been in the courts for more than six and one-half (6½) years, and the petition presents

no "special or important reasons" for further continuation of this litigation. The contentions of Petitioner have received painstaking consideration by the trial judge, further consideration by a three judge Court of Appeals, and again upon a rehearing en banc further consideration by the entire membership (except Judges Fee and Lemmon) of the Court of Appeals for the Ninth Circuit. There is presented, in the apt words of Justice Frankfurter in McAllister v. U. S., 348 U.S. 19, 75 S. Ct. 6, "no more than an ordinary action for negligence, giving rise, as is frequently the case, to conflict in evaluation of the evidence."

SUMMARY OF THE FACTS

The facts in brief are that for the period from September, 1946, to December, 1950, Petitioner so operated an aluminum reduction factory near Troutdale, Oregon, that literally thousands of pounds of toxic fluoride compounds were emitted daily (R. 424-426), polluting the neighborhood and poisoning and injuring the three members of the Martin family (Respondents) living on their farm adjacent to the factory. Trial before a jury resulted in a verdict in favor of the father, Paul Martin, for $15,000.00 damages for the personal injuries sustained from this exposure to the poisonous effluents, a verdict in favor of the mother, Verla Martin, for $10,000.00, and a verdict in favor of the daughter, Paula Martin, for $5,000.00. In addition verdict was given for special damages (medical and like expenses) amounting to the stipulated sum of $2,764.30 in each of the three cases.

LEGAL BASIS OF LIABILITY

The trial court instructed the jury to the effect that, with the Petitioner in sole control of the factory and with the admitted escape of these poisonous effluents, the jury might infer negligence under the familiar rule of res ipsa loquitur.

On the appeal to the Court of Appeals, and again in the petition in this court, the Petitioner has complained that it should have been absolved as a matter of law from liability for the consequences of its tortious conduct, the contention being that the jury should not have been permitted to find that the defendant (Petitioner) was careless in pouring forth these poisons.

Under the Oregon law (which governs, these being diversity cases) the Petitioner would have had no right to complain if the cases had been submitted to the jury under the rule of strict liability without the necessity of a finding of "negligence." For this rule of strict liability the following Oregon cases are ample authority:

Bedell v. Goulter, 199 Or. 344, 261 P. (2d) 842;

Brown v. Gessler, 191 Or. 503, 230 P. (2d) 541, 23 A.L.R. 2d 815, 1 Exch. 278;

Huber v. Portland Gas & Coke Co., 128 Or. 363, 274 P. 509;

Kesterson v. California-Oregon Power Co., 114 Or. 22, 228 P. 1092;

O-W R. & N. Co. v. Reed, 87 Or. 398, 169 P. 342, 170 P. 300;

Mathews v. Chambers Power Co., 81 Or. 251, 159 P. 564;

Chapman v. Dean, 58 Or. 475, 115 P. 154;

Roots v. Boring Junction Lumber Co., 50 Or. 298, 92 P. 811, 94 P. 182;
Esson v. Wattier, 25 Or. 7, 34 P. 756;

The United States District Court for Oregon has imposed the same rule:

Ure v. United States, 93 Fed. Supp. 779;
Cartwright v. Southern Pacific Co., 206 F. 234;
Thorup v. Reynolds Metals Co., Civil No. 5884.

The trial court chose to submit the cases to the jury with negligence, rather than strict liability as for trespass, the basis upon which the jury might find Petitioner liable. This choice is fully in accord with the Oregon law as announced in:

Suko v. Northwestern Ice and Cold Storage Co., 166 Or. 557, 113 P. (2d) 209;
Mallett v. Taylor, 78 Or. 208, 152 P. 873;
Sharkey v. Portland Gas Co., 74 Or. 327, 144 P. 1152, 145 P. 660.

Petitioner in the Court of Appeals and again here in this Court stresses a contention that Petitioner should have been absolved from liability because Petitioner showed at the trial that it had used proper care to minimize the escape of these toxic substances.

But under the governing Oregon law, at least, the inference of negligence arising from their escape is evidence sufficient to take the case to the jury, and to avoid a non-suit or a directed verdict, no matter how persuasive the explanation of the defendant might seem to the trial judge.

When the defendant is in sole charge of the instrumentality which does the damage, a prima facie

conclusion of negligence is imputed to the defendant, and the evidence of the defendant of persistent effort, or due care, or of every precaution, no matter how voluminous, will not overcome the presumption of negligence arising from the occurrence.

Thus, in Suko v. Northwestern Ice Co., supra, where defendant's "effort was to show that it was not at fault", the Court held that, "It was a question for the jury, with all the evidence before it, whether the preponderance of such evidence was in favor of the plaintiff" (166 Or. at 568).

In Gillilan v. Portland Crematorium Assn., 120 Or. 286, 249 P. 627, where a marble vault shutter fell, the Oregon Court said:

> "True, evidence was introduced tending to prove that these shutters were properly secured, but was the jury bound to accept this as conclusive on the question of negligence? From the record before us, we cannot say as a matter of law that this evidence overcomes the inference or presumption of negligence arising from the manner in which the accident happened. . . It was for the jury to determine the ultimate fact, as to whether the defendant exercised due care."

In Coblentz v. Jaloff, 115 Or. 656, 239 P. 825, defendant "submitted evidence that the bus was carefully inspected by skilled mechanics, and that every precaution was taken for the safety of passengers," but the Court said that "it nevertheless remained for the jury to say whether the prima facie case made by plaintiff had been overcome. Its decision in that respect is not for this court to review." (115 Or. at 660).

In Richardson v. Portland T. Car. Co., 113 Or. 544, 233 P. 540, it appeared that "much evidence was offered in explanation of the accident and to show that the door was not in a defective condition," but the Court said that this "did not prevent the jury from drawing the reasonable inference that the latch was defective by reason of the fact that it failed to keep the door shut. . . . It is not for us to say as a matter of law that a presumption of negligence has been overcome by evidence, as that is a matter within the exclusive province of the jury to determine." (113 Or. at 550).

STATUTE OF LIMITATIONS

The statute of limitations is admittedly not applicable in the case of the daughter, Paula Martin Yturbide, a minor at the time of the commission of the tort.

Respondents, Paul Martin and Verla Martin, continued to be exposed to the poisonous outpourings of Petitioner until November 30, 1950, when they moved away from their farm (Pre-Trial Order, Agreed Facts, R. 29 and R. 32). Their actions were commenced on January 7, 1952, less than two years after the exposure ceased (R. 5).

Petitioner refers to the Oregon case of Piukkula v. Pillsbury Astoria Flouring Mills Co. (1935), 150 Or. 304, 42 P. (2d) 921, 44 P. (2d) 162. In this case the complaint alleged "that on September 7, 1930, more than two years before Piukkula filed his complaint, he experienced difficulty in breathing, and, upon the advice of a physician, left the defendant's employ to pursue

other work in the out-of-doors." In other words according to the complaint the exposure to deleterious dust at his place of employment ceased more than two years before he commenced his action. This Piukkula case therefore has no application to the present situation where the exposure continued until less than two years before the actions were commenced. Two Oregon cases involving a continuing course of conduct, both decided after the Piukkula decision, announce the Oregon rule that the statute of limitations commences to run only from the last date of the continuing tort. They are:

Shives v. Chamberlain (1942), 168 Or. 676, 126 P. (2d) 28;

Hotelling v. Walther (1942), 169 Or. 559, 130 P. (2d) 944.

Hence under Oregon law the statute of limitations has no application. The Oregon rule is the same as that announced by this Court in Urie v. Thompson, 337 U.S. 163, 69 S. Ct. 1018, in connection with the Federal Employer's Liability Act, wherein this Court rejected the theory "that each intake of dusty breath is a fresh 'cause of action'."

BEFORE TRIAL DEPOSITION OF PHYSICIANS

The case of Paula Martin Yturbide is not in any way involved in this contention of Petitioner.

More than two and one half years after the cases of Paul Martin and Verla Martin had been commenced, and with trial set for August 25, 1955, Petitioner gave notice of the taking of the discovery depositions of Dr.

Hills and Dr. Proctor, in Baltimore, Maryland, on August 16, 1955.

Respondents, Paul Martin and Verla Martin, objected to the taking of the depositions at the time and place indicated. Nevertheless, the deposition of Dr. Hills, at least (Dr. Proctor apparently not being available), was taken by Petitioner's Maryland attorneys at the time and place indicated in the notice and in the absence of any attorneys for these Respondents.

Subsequently (R. 83-4, 53, 55) the trial judge entered an order limiting the scope of the examination of these physicians so as to exclude examination upon privileged matters.

Petitioner complains of this order, which actually was filed long after the trial concluded (R. 14, 53 in the Verla Martin case; R. 14, 55 in the Paul Martin case).

For any of numerous reasons there is no merit whatever in this contention of Petitioner.

1. The scope of discovery depositions may be limited by the trial judge at his discretion (Rules of Civil Procedure, Rule 26 (b), 28 U.S.C.A. p. 286), whether the limitation extends to privileged matter or any other subject matter. Therefore the order was not objectionable, not even considering that the limitation related only to privileged matter.

2. There was no showing that the attorneys examining Dr. Hills refrained from asking any questions along any line of examination, privileged or otherwise, because of the contemplated order of the trial judge,—indeed

there was no showing that the attorneys were even aware that the trial judge intended to limit the scope of their questioning.

3. The order did not in any way affect the trial, nor did it prevent Petitioner from using Dr. Hills or Dr. Proctor as witnesses, after the plaintiffs waived their privilege by offering themselves as witnesses, nor did it prevent Petitioner from using the deposition of Dr. Hills actually taken and listed as a pre-trial exhibit (R. 50).

4. The matters excluded by the order were privileged under the law of Oregon, and the privilege had not been waived by either Respondent under the law of Oregon.

Under Oregon law (ORS 44.040) a physician shall not be examined in a civil action as to information acquired in attending a patient.

Under Oregon law this privilege is waived only if the patient "offers himself as a witness" (ORS 44.040), which neither of these Respondents had done. Neither had they waived their privilege under Rule 35 of the Rules of Civil Procedure.

Hence the trial court was entirely correct in making the order limiting the scope of the examination of these two doctors, and whether correct or not Petitioner has shown no prejudice or disadvantage resulting therefrom.

CONCLUSION

The factual issues were decided by the verdicts of the jury. The legal questions received the thorough consideration of an able and painstaking trial judge. On the appeal the Oregon law was extensively briefed by counsel for Petitioner and argued before Chief Judge Denman and Judges Pope and Chambers. Upon a rehearing en banc the Oregon law was again exhaustively briefed not only by counsel for Petitioner, but also by counsel for each of the seven industrial corporations mentioned at page 8 of the Petition, as amici curiae. The Court of Appeals did not in any respect decide "in conflict with applicable state or territorial law," but simply affirmed the correct application by the trial judge of the Oregon law as contained in its statutes and the many decisions of its highest court.

It is respectfully submitted that the Petition should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George W. Mead, one of the attorneys for Paula Martin Yturbide, Verla Martin and Paul Martin, Respondents herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I served the foregoing Brief upon Counsel for Petitioner by mailing by first class air mail, with air mail postage fully prepaid, a copy thereof to Joseph H. McConnell, Gustav B. Margraf and W. Tobin Lennon, Reynolds Metals Building, Richmond, Virginia, they being Counsel for Petitioner and that being their post-office address; and by delivering a copy thereof at the office of King, Miller, Anderson, Nash & Yerke, Frederic A. Yerke, Jr., and Clifford N. Carlsen, Jr., in the American Bank Building, Portland 5, Oregon, they being the Attorneys for Petitioner.

Dated at Portland, Oregon, this — day of September, 1958.

GEORGE W. MEAD,
Of Counsel for Respondents.